

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT KNOXVILLE
September 23, 2008 Session

STATE OF TENNESSEE v. JEFFREY SCOTT NICHOLS

Appeal from the Criminal Court for Bradley County
No. M-06-308 Amy A. Reedy, Judge

No. E2007-01865-CCA-R3-PC - Filed December 19, 2008

The Petitioner, Jeffrey Scott Nichols, appeals from the Bradley County Criminal Court's order denying his petition for post-conviction relief. He argues that the denial of relief was erroneous because, prior to pleading guilty to aggravated kidnapping, unlawful flight, and multiple counts of rape of a child, aggravated sexual battery, and sexual exploitation of a minor, he did not receive the effective assistance of counsel and, therefore, his pleas were entered involuntarily. His argument centers around his contentions that trial counsel failed to thoroughly investigate the Petitioner's cases and failed to challenge venue, and that an actual conflict of interest existed when trial counsel represented the Petitioner's father in a civil action against the Petitioner. Following our review of the record and the parties' briefs, we conclude that the Petitioner has not demonstrated that trial counsel was constitutionally ineffective or that his pleas were involuntary. Consequently, we affirm the post-conviction court's order denying post-conviction relief.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Criminal Court Affirmed

DAVID H. WELLES, J., delivered the opinion of the court, in which JOSEPH M. TIPTON, P.J., and JERRY L. SMITH, J., joined.

Barry R. Tidwell and John W. Price, Murfreesboro, Tennessee, for the appellant, Jeffrey Scott Nichols.

Robert E. Cooper, Jr., Attorney General and Reporter; John H. Bledsoe, Assistant Attorney General; Steven Bebb, District Attorney General; and Drew Robinson, Assistant District Attorney General, for the appellee, State of Tennessee.

OPINION

Factual Background

This case arises from allegations of sexual abuse by three minors, resulting in multiple charges by Bradley County grand juries against the Petitioner. As a result of the numerous charges, he pleaded guilty on June 20, 2005, to ten counts of aggravated sexual battery (case number 02-398 and case numbers 02-530 through 02-538), thirteen counts of sexual exploitation of a minor (case number 03-180), and failure to appear (case number 03-181). See Tenn. Code Ann. §§ 39-13-504, -16-609, -17-1003.¹ The Petitioner also entered an Alford guilty plea² to five counts of rape of a child and one count of aggravated kidnapping (case 02-706). See Tenn. Code Ann. §§ 39-13-304, -522.

At the guilty plea hearing, the State recounted the following facts supporting the Petitioner's convictions:

Judge, in 02-398, and also in 02-530 thru [sic] 538, the state's proof with both of the victims would be that the [Petitioner] did fondle their genitals on each date alleged in the indictment, and in 02-706, the state's proof would be that the [Petitioner] performed oral sex on the victim in that case, and that he took him to his home and put a barbell up against the door where he was not permitted to leave from the bedroom of the [Petitioner's] home.

....

... In 03-180, Judge, the state's proof would be that we recovered the laptop computer, that the laptop computer was sent to the lab for testing and that there were pornographic images of children recovered from the laptop.

....

Judge, I will also say that in that in 02-398 the victim went back and spoke with the [Petitioner] and he was wired with a tape recorder and that the [Petitioner] did make some admissions at that time and apologized to the victim for what had gone on.

Pursuant to the plea agreement, the Petitioner received a total effective sentence of seventeen years at 100%. It was also noted at the guilty plea hearing that the Petitioner was a basketball coach and a director of the Boys and Girls Club and that, if he had not pleaded guilty, the trial court could have used such positions of trust to enhance his sentences.

¹ Copies of the all the judgment forms are not included in the record.

² This type of plea is named after North Carolina v. Alford, 400 U.S. 25 (1970), in which the United States Supreme Court discussed the right of an accused to plead guilty in his best interest while professing his actual innocence.

The Petitioner filed a timely pro se petition for post-conviction relief. Subsequently, an amended petition was filed. In his amended petition, the Petitioner asserted that his lead trial counsel (“trial counsel”)³ was constitutionally ineffective because counsel failed to conduct a thorough investigation, failed to obtain hearings and rulings on motions, failed to challenge venue, and had an actual conflict of interest, all of which rendered the Petitioner’s pleas unknowing and involuntary. Subsequently, the post-conviction court held a hearing at which the Petitioner, trial counsel, and the investigating officer testified.

First to testify was Lieutenant John Dailey of the Cleveland Police Department. Lieutenant Dailey testified that he investigated the sexual allegations made by the three minors against the Petitioner and that he turned over all of his investigative materials to the district attorney’s office. When asked about some notes he made on case 02-706, he confirmed that following his interview with one victim, he wrote, “[F]all of 2001 he stopped going to [the] club, and after [the Petitioner] was mean to him at basketball practice. Nothing sexual occurred in Bradley County.”

On cross-examination, Lt. Dailey confirmed that the Petitioner failed to appear when his case was originally set for trial. Entered as exhibits to Lt. Dailey’s testimony were excerpts from a Children Advocacy Center Report and a Child Protective Services Report detailing interviews with the victim in case number 02-706. Also introduced as exhibits were a cassette tape⁴ and a transcript of that tape depicting a conversation between the Petitioner and the same victim, wherein the Petitioner admitted to abusing the victim and apologized for his behavior.

The Petitioner then testified. He stated that he appeared in court the day before he was set for trial and that he was shown the transcript of the tape. According to the Petitioner, there was supposed to be a suppression hearing to keep the transcript from being admitted into evidence at trial but no hearing ever occurred. Trial counsel informed the Petitioner that the transcript was going to be used against him at trial, which had been described to him “as one of the most important elements of the case.”

The Petitioner was never present at any motion hearings, and he did not receive any orders, memoranda, or summations of any motions heard. The Petitioner acknowledged that motions were filed on his behalf but claimed that he was not shown these motions prior to his pleas. He also stated that, as far as he knew, none of these motions were ever heard.

The Petitioner confirmed that he had listened to the cassette tape of the conversation between him and the victim in case number 02-706. According to the Petitioner, the alleged sexual abuse of this victim occurred at the Petitioner’s home in Polk County, not in Bradley County where he was prosecuted.

³ The Petitioner was represented by two attorneys in his trial proceedings.

⁴ The tape is not included in the record on appeal.

The transcript of the Petitioner's guilty plea hearing was entered into evidence. The Petitioner affirmed that the transcript was accurate. He claimed that he had not received any discovery materials prior to his guilty pleas, which were entered the day before his case was set for trial. He received all of the discovery following his incarceration and had since reviewed all of the materials. When looking at the reports, he discovered that one victim (case 02-706 involving five counts of child rape) stated that the sexual abuse only occurred one time. The Petitioner claimed that, if he had seen these reports prior to his pleas involving different acts of child rape, he "absolutely" would not have pleaded guilty.

When asked how many times trial counsel visited the Petitioner, the Petitioner responded that "there was [sic] two brief periods of time" of not more than five minutes. In addition, there was the meeting they had the day before trial when the Petitioner entered his pleas. At this last meeting, trial counsel and second defense counsel questioned the Petitioner to prepare for trial. His attorneys determined that the Petitioner would make a "bad witness." The Petitioner claimed that he wanted to proceed with trial but that he pleaded guilty due to trial counsel's ineptitude.

The Petitioner was then shown a 2003 letter from second defense counsel to trial counsel, requesting trial counsel to institute a civil action on behalf of Rufus Nichols, the Petitioner's father, against the Petitioner. The purpose of the suit was "to secure title to the subject real estate [the Petitioner's foreclosed home] for Mr. Rufus Nichols so that he may recoup at least a portion of the expenses which he has advanced to his son" for legal expenses. The Petitioner believed that trial counsel had resigned from representing him at the time. Trial counsel had "resigned for a month or two period of time," and this may have been during that time. At the time the Petitioner entered his guilty pleas, he was following the advice of trial counsel. The Petitioner opined that, based upon the civil action filed by the Petitioner's father, trial counsel took a position contrary to the Petitioner's interests.

On cross-examination, the Petitioner affirmed that he was not aware he would have to serve his sentence at 100%. He also stated that counsel relayed one other offer from the State of twenty-two years. However, based upon a statement by trial counsel, the Petitioner believed that a sentence of ten years was offered but that this offer was never conveyed to him. He testified that he had "a couple" of conversations with second defense counsel.

The Petitioner affirmed that, prior to his pleas, he wrote the trial judge a letter requesting a continuance because he was not able to get in touch with trial counsel and he wanted a new attorney. He acknowledged that his pleas were entered about a week after he wrote the letter. He further confirmed that he was asked at the guilty plea hearing whether he had any complaints about trial counsel and that he answered in the negative. The trial judge also referenced the Petitioner's letter seeking to fire trial counsel and again asked if the Petitioner was satisfied with their representation. Again, the Petitioner expressed no concern with counsel's representation. When questioned about the responses detailed above, the Petitioner testified that he "answered that with the understanding from my counsel that there would be no continuance granted and if I did fire my counsel that I would proceed to trial the next day with the public defender which would be ill prepared."

When asked about his understanding of his release eligibility, the Petitioner maintained that he was told he would have to serve only 85% of his sentence rather than 100% as provided by statute for rape of a child. However, he affirmed that he received a letter from second defense counsel stating that trial counsel relayed a sentence of seventeen years at 100% to the Petitioner on more than one occasion. The Petitioner acknowledged that, at the guilty plea hearing, trial counsel conveyed that the Petitioner's effective sentence was seventeen years at 100% and that he stated before the court that he understood the sentence. However, based upon the Tennessee Code, he believed he would only have to serve 85% of his sentence.

When asked if his attorneys had discussed the case with him, he said that they had discussed the case going to trial the next day but that they had not talked about the other cases. He also confirmed that trial counsel informed him that his flight from the jurisdiction and subsequent failure to appear could be used against him in each of the cases. Enhancement factors were also discussed, including his position as director of the Boys and Girls Club and potentially the age of the victims. The possibility of consecutive sentencing was likewise covered in conversations; according to the Petitioner, trial counsel stated that he could face "60 years or something of nature," but he admitted that trial counsel stated one hundred and fifty years at the guilty plea hearing. According to the Petitioner, his attorneys also discussed the Alford or "best interest" plea with him, and he understood the nature of such a plea. Trial counsel informed the Petitioner that the State would not agree to a "best interest" plea on all the charges.

Trial counsel testified that he engaged in plea discussions and other potential resolutions with the Petitioner prior to the indictments being returned. The Petitioner took the position that he was not guilty of any wrongdoing. Trial counsel believed it was important to discuss resolutions of the cases early before "community interest" got very high. When asked how many times he had met with the Petitioner prior to the indictments, he recalled a "lengthy" meeting in a Dalton, Georgia restaurant, and he remembered telephone conversations with the Petitioner. He also stated that he met with the Petitioner in his office after the Petitioner was indicted.

After counsel's "first contact" with the Petitioner, he was aware of the recorded conversation between the Petitioner and one of the victims. Trial counsel confirmed that he received "a couple of audio tapes" of the conversation. There was one tape that was inaudible in parts. The other tape was an enhanced version of the conversation, and trial counsel was provided with a transcript. Trial counsel did not know if these tapes were provided to the Petitioner, but he was certain that he discussed the tapes with the Petitioner. He confirmed that it was "possible" that the Petitioner did not listen to the first tape. According to trial counsel, he had conversations and written exchanges with the Petitioner about trying to get the transcript excluded, and these exchanges occurred prior to the Petitioner being incarcerated in this case.

Trial counsel considered filing a motion to suppress the transcript before trial but saw it as a matter of trial strategy to wait until the trial. When asked how the recording would have impacted the Petitioner's case, trial counsel responded that the transcript would have been "significantly prejudicial" to the Petitioner and was "far more significant than the recording." Regarding a pre-trial motion hearing, trial counsel theorized as follows:

I knew with absolute certainty what the outcome of the motion hearing would be, and that is that the [c]ourt would have allowed the jury to have heard the, at least the first tape and would have allowed the state to hear the [c]ourt's reasoning about the use of the enhanced tape, that they would have to have the witness here who participated in the enhancement to show that no alterations were made and those kind of things and so my belief is that it would have substantially weakened the prospect of our resolution of the case if we were forced to trial.

He did believe that he had "a legal arguable basis for the filing the motion."

Regarding his efforts at discovery in the cases, trial counsel stated that the State had an open discovery policy and that he was permitted to view any documents. Trial counsel testified that he had viewed discovery in all of the cases but that his focus was on the first case set for trial. When asked if he provided copies of all documents to the Petitioner, trial counsel responded that he had not because the Petitioner was in custody and he did not want other prisoners having access to certain documents. He did recall specifically going over the discovery materials with the Petitioner in the rape of a child case.

Trial counsel opined that the Petitioner had "a good defense" to at least four of the five counts of child rape, the victim having made inconsistent statements. Yet, ultimately, the Petitioner pleaded guilty to all counts of child rape; trial counsel explained that the district attorney general "had a policy of requiring his stats to be as high as they could and in exchange for statistical data that would reflect favorably astonishingly they would give you a better deal if you would plead to more counts than they would if you would plead guilty to one count" Based upon trial counsel's recollection of the victim's statements, the Petitioner most likely would have been convicted only of the kidnapping charge and one count of rape of a child; even so, it was believed that the Petitioner would probably still have received a longer sentence than seventeen years if he proceeded to trial. Trial counsel claimed to have explained all of this to the Petitioner prior to his pleas.

Trial counsel was aware that, in case 02-706, the sexual acts occurred in Polk, not Bradley, County. Counsel recalled that the Petitioner would pick up the victim in Bradley County before going to his Polk County residence. Regarding a possible venue defense, trial counsel testified as follows:

I had had discussions with Detective Dailey and I think that we talked about it right back here in the room, that if the jury believed [the victim] in his statements there's a venue defense that I have used successfully in a trial, but my client was going to be found guilty as homemade sin of having done something. Because the jury is told, one of the very first parts of our instructions are, as you know, is that the constitutional or whatever, I've forgotten how the charge reads, that you've got to find venue in the case and that this crime occurred here in Bradley County, and . . . if the jury believed [the victim] that we could potentially get a jury verdict of not guilty or an acquittal here. You know, forum shopping for a defendant and the state carries with it lots of risks, but it is a potential problem when the state says

something happened somewhere or they try to use some kind of hypotechnical reason to say that it happened here, and, you know, jurors want to vote and treat fairly.

Trial counsel characterized his behavior in these types of situations as “trial strategy.”

Trial counsel relayed that, after the Petitioner was indicted in the first case, he was released on bond. When the Petitioner failed to appear in court, trial counsel filed a motion to withdraw. According to trial counsel, the Petitioner’s father had paid the Petitioner’s legal bills and fees, and the Petitioner owed his father approximately \$9,000 for a “cash bond” paid on the Petitioner’s behalf. There was purportedly some equity in the Petitioner’s home, and there was a notice of foreclosure pending against the residence. Trial counsel’s firm instituted a civil lawsuit on behalf of the Petitioner’s father against the Petitioner to “recapture” the \$9,000 by attempting to “set aside the foreclosure.” According to trial counsel, another lawyer in his office handled the matter. Ultimately, the suit was dismissed.

When the Petitioner was apprehended, the Petitioner was informed of the civil action and elected to have trial counsel continue to represent him. No order of withdrawal was ever entered. Trial counsel opined that it was not

a contrite lawsuit, that it was a lawsuit and that it was beneficial, but my suspicion is that inquiry [was] made [the Petitioner] and Rufus Nichols have never had a cross word between themselves and don’t have any dispute and it was certainly consensual if not [the Petitioner’s] suggestion that this attempt was made to save the nine thousand dollars.

On cross-examination, trial counsel testified that, if the Petitioner had not entered his guilty pleas, he faced at least five separate trials. If convicted by a jury and the trial judge was to determine the length of the Petitioner’s sentences, trial counsel was concerned with an enhanced sentence based upon the Petitioner’s position of trust. Trial counsel was also concerned about the possibility of consecutive sentences. Trial counsel further stated that, in at least one case, if not all of the cases, a flight instruction would have been included in the jury instructions.

In plea negotiations, trial counsel was focused on the actual time to be served rather than the particular counts to which the Petitioner would plead guilty. Trial counsel believed the Petitioner made an intelligent and informed decision to plead guilty and stated, “There’s no question that he knew what he was doing at all. He didn’t like it but he knew what he was doing.”

After hearing the evidence presented, the post-conviction court denied relief, making findings on the record as follows:

First off I make a finding that the credibility in this matter is in favor, and it’s not in favor because all the witnesses were for [the Petitioner] here today, but [trial counsel’s] credibility is corroborated, and their testimony is not completely contrary to one another, but his credibility is corroborated by more than just what he says, it’s corroborated by parts of his file [The Petitioner’s] credibility, he definitely

loses favor with this [c]ourt because of the fact the record is clear that he fled this jurisdiction while the charges were pending, and [the Petitioner] attempted inappropriate contact with previous court in this matter. Those things cause me to weigh matters of credibility in favor of [trial counsel].

Further findings that I have is I look at the amended petition, the allegation that motions were not called up for a hearing. Well, there's two reasons why they weren't: first there were reasons, legal maneuvering reasons, that [trial counsel] made to call up or not call up certain issues, but the primary reason that the motions were not called up is that as I see the court file [the Petitioner] fled the jurisdiction and so it would be difficult with [the Petitioner] having fled the jurisdiction to call those things up for a hearing. However, the motions that we have talked about are couched as motions to suppress but in limine matters and that the [c]ourt could have taken up on the morning of trial. It's couched as a motion to suppress but the issue is more of an in limine matter. Any time a transcript is in issue, it's an evidence question, and it can be raised, and [trial counsel], a fine lawyer, had reasons for raising it at the last minute with inexperienced, in this case, prosecutors, and based on the testimony I heard about a 17 year plea for many, many counts of serious crimes apparently it was a DA's office with very little depth is the nicest way I will put that. And even though they appeared to have an "open policy" of discovery I'm not sure how aware of their discovery they were and that's where issue number three, the venue defense was not raised. Well, probably, this [c]ourt feels, for very good legal reasons. If that plea fell through and you have made a prosecutor unaware of something they should have been aware of, you have done away with a very good defense once that jury is sworn. And so that's obviously something that had been considered by [trial counsel] and he considered that to be something that he would not raise at that time for reasons, but it's obviously something that he's testified to that he was very well aware of, and so he was not deficient in that regard.

Nobody talked about it in their argument but the testimony that I heard as to issue number four was that the litigation was in fact not contrary to [the Petitioner], that [trial counsel's] office did handle, that someone in his office did handle that. So I did not find that that representation to be contrary to [the Petitioner]

Hard copy of discovery. That's not raised in the amended petition, but it is raised here as an overview of the allegation of ineffective assistance of counsel, and [trial counsel] very clearly has testified he had a reason for that, he didn't want someone incarcerated to have hard copies of discovery even though he testified he went over discovery with [the Petitioner]. He didn't want him to have hard copies of discovery while they are incarcerated, and that is probably very good legal advice that very few clients follow.

The trial court subsequently entered a written order finding that the Petitioner had failed to prove by clear and convincing evidence that trial counsel's performance was deficient. This appeal followed.

Analysis

On appeal, the Petitioner argues that trial counsel was constitutionally ineffective and that his plea was involuntary. The Petitioner alleges ineffectiveness of his trial counsel on grounds that counsel did not conduct a thorough investigation of the Petitioner's charges and did not seek a change of venue. He further argues that his trial counsel was ineffective due to a conflict of interest resulting from counsel's representation of the Petitioner's father in a civil action.

To sustain a petition for post-conviction relief, a petitioner must prove his or her factual allegations by clear and convincing evidence at an evidentiary hearing. See Tenn. Code Ann. § 40-30-110(f); Momon v. State, 18 S.W.3d 152, 156 (Tenn. 1999). Upon review, this Court will not reweigh or re-evaluate the evidence below; all questions concerning the credibility of witnesses, the weight and value to be given their testimony, and the factual issues raised by the evidence are to be resolved by the post-conviction judge, not the appellate courts. See Momon, 18 S.W.3d at 156; Henley v. State, 960 S.W.2d 572, 578-79 (Tenn. 1997). The post-conviction judge's findings of fact on a petition for post-conviction relief are afforded the weight of a jury verdict and are conclusive on appeal unless the evidence preponderates against those findings. See Momon, 18 S.W.3d at 156; Henley, 960 S.W.2d at 578.

The Sixth Amendment to the United States Constitution and article I, section 9 of the Tennessee Constitution guarantee a criminal defendant the right to representation by counsel. State v. Burns, 6 S.W.3d 453, 461 (Tenn. 1999); Baxter v. Rose, 523 S.W.2d 930, 936 (Tenn. 1975). Both the United States Supreme Court and the Tennessee Supreme Court have recognized that the right to such representation includes the right to "reasonably effective" assistance, that is, within the range of competence demanded of attorneys in criminal cases. Strickland v. Washington, 466 U.S. 668, 687 (1984); Burns, 6 S.W.3d at 461; Baxter, 523 S.W.2d at 936.

A lawyer's assistance to his or her client is ineffective if the lawyer's conduct "so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." Strickland, 466 U.S. at 686. This overall standard is comprised of two components: deficient performance by the defendant's lawyer and actual prejudice to the defense caused by the deficient performance. Id. at 687; Burns, 6 S.W.3d at 461. The defendant bears the burden of establishing both of these components by clear and convincing evidence. Tenn. Code Ann. § 40-30-110(f); Burns, 6 S.W.3d at 461. The defendant's failure to prove either deficiency or prejudice is a sufficient basis upon which to deny relief on an ineffective assistance of counsel claim. Burns, 6 S.W.3d at 461; Goad v. State, 938 S.W.2d 363, 370 (Tenn. 1996).

This two-part standard of measuring ineffective assistance of counsel also applies to claims arising out of a guilty plea. Hill v. Lockhart, 474 U.S. 52, 58 (1985). The prejudice component is modified such that the defendant "must show that there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial." Id. at 59; see also Hicks v. State, 983 S.W.2d 240, 246 (Tenn. Crim. App. 1998).

In evaluating a lawyer's performance, the reviewing court uses an objective standard of "reasonableness." Strickland, 466 U.S. at 688; Burns, 6 S.W.3d at 462. The reviewing court must be highly deferential to counsel's choices "and should indulge a strong presumption that counsel's

conduct falls within the wide range of reasonable professional assistance.” Burns, 6 S.W.3d at 462; see also Strickland, 466 U.S. at 689. The court should not use the benefit of hindsight to second-guess trial strategy or to criticize counsel’s tactics, see Hellard v. State, 629 S.W.2d 4, 9 (Tenn. 1982), and counsel’s alleged errors should be judged in light of all the facts and circumstances as of the time they were made, see Strickland, 466 U.S. at 690; Hicks v. State, 983 S.W.2d 240, 246 (Tenn. Crim. App. 1998).

A trial court’s determination of an ineffective assistance of counsel claim presents a mixed question of law and fact on appeal. Fields v. State, 40 S.W.3d 450, 458 (Tenn. 2001). This Court reviews the trial court’s findings of fact with regard to the effectiveness of counsel under a de novo standard, accompanied with a presumption that those findings are correct unless the preponderance of the evidence is otherwise. Id. “However, a trial court’s conclusions of law—such as whether counsel’s performance was deficient or whether that deficiency was prejudicial—are reviewed under a purely de novo standard, with no presumption of correctness given to the trial court’s conclusions.” Id. (emphasis in original).

Regarding the voluntariness of his pleas, when a guilty plea is entered, a defendant waives certain constitutional rights, including the privilege against compulsory self-incrimination, the right to trial by jury, and the right to confront witnesses. Boykin v. Alabama, 395 U.S. 238, 243 (1969). “A plea of guilty is more than a confession which admits that the accused did various acts; it is itself a conviction; nothing remains but to give judgment and determine punishment.” Id. at 242. Thus, in order to pass constitutional muster, a guilty plea must be voluntarily, understandingly, and intelligently entered. See id. at 243 n.5; Brady v. United States, 397 U.S. 742, 747 n.4 (1970). To ensure that a guilty plea is so entered, a trial court must “canvass[] the matter with the accused to make sure he [or she] has a full understanding of what the plea connotes and of its consequence[s].” Boykin, 395 U.S. at 244. The waiver of constitutional rights will not be presumed from a silent record. Id. at 243.

In State v. Mackey, 553 S.W.2d 337 (Tenn. 1977), the Tennessee Supreme Court set forth the procedure for trial courts to follow in Tennessee when accepting guilty pleas. Id. at 341. Prior to accepting a guilty plea, the trial court must address the defendant personally in open court, inform the defendant of the consequences of a guilty plea, and determine whether the defendant understands those consequences. See id.; Tenn. R. Crim. P. 11. A verbatim record of the guilty plea proceedings must be made and must include, without limitation, “(a) the court’s advice to the defendant, (b) the inquiry into the voluntariness of the plea including any plea agreement and into the defendant’s understanding of the consequences of his entering a plea of guilty, and (c) the inquiry into the accuracy of a guilty plea.” Mackey, 553 S.W.2d at 341.

However, a trial court’s failure to follow the procedure mandated by Mackey does not necessarily entitle the defendant to post-conviction relief. See State v. Prince, 781 S.W.2d 846, 853 (Tenn. 1989). Only if the violation of the advice litany required by Mackey or Tennessee Rule of Criminal Procedure 11 is linked to a specified constitutional right is the challenge to the plea cognizable in post-conviction proceedings. See Bryan v. State, 848 S.W.2d 72, 75 (Tenn. Crim. App. 1992). “Whether the additional requirements of Mackey were met is not a constitutional issue and cannot be asserted collaterally.” Johnson v. State, 834 S.W.2d 922, 925 (Tenn. 1992).

I. Investigation

On appeal, the Petitioner argues that trial counsel failed to make a reasonable investigation into his charges and failed to adequately communicate with the Petitioner. Specifically, he asserts that trial counsel was deficient in failing to: (1) adequately prepare for trial; (2) adequately investigate the facts of the Petitioner's case; (3) provide the Petitioner with a copy of all discovery materials; and (4) meet with the Petitioner a sufficient number of times. There was also testimony presented at the post-conviction hearing that trial counsel did not pursue pretrial motions in a timely fashion and that the Petitioner did not understand that his sentence was to be served at 100%.

The post-conviction court's decision expresses strong reliance upon the testimony of trial counsel, who testified that he reviewed the discovery in the Petitioner's cases and discussed the discovery materials with the Petitioner. He also articulated regular communications with the Petitioner. Trial counsel considered it a matter of trial strategy to wait to seek suppression of the transcript until the morning of trial. Trial counsel testified that, in the rape of a child case, he was aware of the victim's inconsistent statements and opined that the Petitioner had "a good defense" to four counts of child rape. Also, the Petitioner himself confirmed that he had heard the cassette tape of the conversation between him and the victim. The Petitioner further testified that he had "a couple" of conversations with second defense counsel. According to the Petitioner, his attorneys discussed his Alford or best interest plea with him, and he understood the nature of such a plea.

The post-conviction court discerned no deficiencies of performance in trial counsel's handling of the Petitioner's cases. The post-conviction court noted that the "primary reason" motions were not heard in this case was because the Petitioner fled the jurisdiction. The court also concluded that the motion to exclude the transcript of the tape was really "more of an limine matter" and could have been raised on the morning of trial. The post-conviction court also found that trial counsel did not provide a copy of discovery to the Petitioner because he was incarcerated and that it was "probably very good legal advice" not to have discovery materials in jail.

Moreover, the guilty plea transcript reveals that the trial judge carefully reviewed the rights that the Petitioner was waiving and confirms that the Petitioner responded appropriately to questions. The transcript of the guilty plea hearing also reflects that the Petitioner's sentences were explained to him, including that his effective seventeen-year sentence would be served at 100%. The Petitioner was asked if he had any complaints about trial counsel, and he answered in the negative. The trial court also referenced the Petitioner's letter seeking a continuance; however, the Petitioner said he was satisfied with trial counsel's representation. The record reflects the Petitioner knew and understood the options available to him prior to the entry of his guilty pleas, including the right not to plead guilty and to demand a jury trial, and he made an informed decision of that course which was most palatable to him at the time.

Based upon the record before this Court, including review of the transcript from the Petitioner's guilty plea hearing, we conclude that the Petitioner knowingly and voluntarily pleaded guilty. The record supports the post-conviction court's finding that the Petitioner failed to prove by clear and convincing evidence that trial counsel's representation constituted deficient performance. He has failed to show prejudice because he did not establish that, but for trial counsel's alleged

errors, he would have proceeded to trial. On these issues, the record supports the post-conviction court's determinations that trial counsel rendered effective assistance.

II. Venue

Next, the Petitioner submits that trial counsel was ineffective for failing to challenge venue in case number 02-706, when the discovery showed that "nothing sexual occurred in Bradley Co." The Petitioner acknowledges that this Court has previously held that a defendant waives his or her right to challenge venue upon pleading guilty; however, he attempts to distinguish his case from this line of precedent, arguing that it should not apply because he did not know he had a "right to venue" and he did not have the discovery to know venue was an issue.

This Court has held that, even though venue is jurisdictional in a criminal case, it can be waived:

Once a criminal defendant has solemnly admitted in open court that he is in fact guilty of the offense with which he is charged, he may not thereafter raise independent claims relating to the deprivation of constitutional rights occurring prior to the entry of the guilty plea. State v. Hodges, 815 S.W.2d 151, 153 (Tenn. 1991). We believe that a criminal defendant waives his right to challenge venue upon pleading guilty. Recor v. State, 489 S.W.2d 64, 69 (Tenn. Crim. App. 1972); Weaver v. State, 472 S.W.2d 898, 902 (1971).

Ellis v. Carlton, 986 S.W.2d 600, 602 (Tenn. Crim. App. 1998).

The Petitioner has failed to show that further efforts by counsel challenging venue prior to his guilty plea would have resulted in a situation in which he would not have entered a guilty plea, but rather would have proceeded to trial. The Petitioner's guilty pleas served to waive any claim he may have had to a jurisdictional deficiency; therefore, even if one or more of the Petitioner's crimes actually took place outside of Bradley County, the Bradley County Criminal Court had jurisdiction to convict the Petitioner upon his pleas of guilty.

The Petitioner has failed to meet the standard for ineffective assistance of counsel in the guilty plea setting. Trial counsel testified that he intended to challenge venue once the jury was sworn. Moreover, had trial counsel challenged venue before trial, the best result the Petitioner could have hoped for was dismissal of the charges in Bradley County and new filings in the appropriate venue. The evidence supports the post-conviction court's conclusion on this issue. Therefore, the Petitioner is not entitled to relief as to this claim.

III. Conflict of Interest

As his final assignment of error, the Petitioner claims that trial counsel was ineffective because he had an actual conflict of interest by representing the Petitioner in this matter and in representing the Petitioner's father in the civil action against the Petitioner. He also notes that he did not consent in writing to the joint representation.

The first issue to be resolved is whether trial counsel did in fact have a conflict of interest which prevented him from representing the Petitioner. “In determining whether to disqualify an attorney in a criminal case, the trial court must first determine whether the party questioning the propriety of the representation met its burden of showing that there is an actual conflict of interest.” State v. White, 114 S.W.3d 469, 476 (Tenn. 2003) (internal citations omitted). “The mere fact that counsel might have a potential conflict of interest in representing multiple clients does not authorize a presumption of ineffective assistance of counsel.” Netters v. State, 957 S.W.2d 844, 847 (Tenn. Crim. App. 1997) (internal citations omitted). “[U]ntil a [petitioner] shows that his counsel actively represented conflicting interests, he has not established the constitutional predicate for his claim of ineffective assistance.” Cuyler v. Sullivan, 446 U.S. 335, 350 (1980).

The record supports the post-conviction court’s finding that there was no actual conflict of interest in the joint representation of the Petitioner and his father. Trial counsel testified that, after the Petitioner failed to appear in court, foreclosure proceedings were instituted against the Petitioner’s home. The Petitioner’s father, Rufus Nichols, had paid the Petitioner’s legal bills and fees, including a “cash bond,” resulting in a debt of approximately \$9,000.00. The civil action was filed on behalf of the Petitioner’s father “to secure title to the subject real estate for [the Petitioner’s father] so that he may recoup at least a portion of the expenses which he has advanced to his son.” The suit was an attempt to “set aside the foreclosure” so the Petitioner’s father could be repaid. According to trial counsel, another lawyer in his office handled the matter. Following the Petitioner’s return to the jurisdiction, he was told of the civil action and, nonetheless, proceeded with representation by trial counsel. Moreover, trial counsel opined that the civil action was not a “contrite lawsuit” and that the Petitioner and his father did not “have any dispute and it was certainly consensual.” Ultimately, the suit was unsuccessful. The record does not reflect that trial counsel represented divergent interests. We conclude that the Petitioner is not entitled to relief on this issue.

Conclusion

Based upon the foregoing, we conclude that the post-conviction court did not err by denying post-conviction relief. Accordingly, we affirm the judgment of the post-conviction court.

DAVID H. WELLES, JUDGE